PACIFIC PLUMBING CONSTRUCTION (M) SDN BHD A

v.

AMBANK (M) BHD

HIGH COURT MALAYA, SHAH ALAM B
ROZANA ALI YUSOFF JC
[CIVIL SUIT NO: 22NCVC-377-05-2013]
6 JANUARY 2014

COMPANY LAW: *Winding up - Notice of demand - Issuance of - Companies Act 1965, s. 218(2)(a) - Judgment creditor did not enforce judgment against judgment debtor - Notice issued after six years from date of judgment - Failure to obtain leave of court - Whether notice valid - Whether winding up proceeding fell within ambit and meaning of "execution" as provided under O. 46 r. 2 Rules of Court 2012 - Whether leave of court necessary - Whether issuance of notice fell within limitation period of 12 years - Limitation Act 1953, s. 6(3)* C D

WORDS & PHRASES: *"execution proceedings" - Meaning of - Whether winding up proceeding fell within ambit and meaning of "execution" as provided under O. 46 r. 2 Rules of Court 2012* E

The defendant had granted a loan facility to the plaintiff in the sum of RM446,946 which was guaranteed by the director and shareholder ('LWK') of the plaintiff. On 10 March 2006, the defendant filed an action against the plaintiff and LWK and judgments were obtained on 2 May 2006 and 8 May 2006, against LWK and the plaintiff, respectively. Subsequently, the receiving and adjudication order was obtained against LWK. However, the defendant, as the judgment creditor, did not enforce the judgment sum against the plaintiff. It was only on 25 April 2013 that the defendant issued a notice of demand under s. 218(2)(a) of the Companies Act 1965 ('the said notice') for the outstanding amount of RM1,523,486.31 due and owing. The plaintiff submitted, *inter alia*, that (i) the said notice was issued after the expiration of the defendant's right of enforcement and therefore, the right of enforcement no longer existed at the time the notice of demand was issued; and (ii) the defendant's notice was invalid as leave under O. 46 of the Rules of Court 2012 ('ROC') was necessary for the issuance of the said notice which was made after six years from the date of judgment. The F G H I

A defendant argued that the leave of court was not required prior to the issuance of the said notice since the proceedings were not a form of enforcement within the meaning of O. 46 of the ROC. In the present claim, the primary issue at hand was whether the said notice was valid in law.

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Held (dismissing plaintiff's claim with costs):

(1) Winding up proceeding could not be equated with enforcement of judgment proceedings and was not within the ambit and meaning of 'execution' proceedings as provided by O. 46 r. 2 of the ROC and thus, leave of court was not necessary in the present case. Further, in *Island Hill Sdn Bhd v. Pengurusan Danaharta Nasional Bhd*, it was held that s. 6(3) of the Limitation Act 1953 applied to winding up proceedings and these proceedings should be instituted within 12 years from the date of judgment. In the present case, the defendant had issued the said notice six years, 11 months and 17 days from the date of the judgment which was well within the limitation period of 12 years. As such, the said notice was valid in law *(Perwira Affin Bank Bhd v. Lim Ah Hee*; foll). (paras 16 & 19)

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Case(s) referred to:

AmBank (M) Bhd v. Tan Tem Son & Another Appeal [2013] 3 CLJ 317 FC ***(refd)***

F *CIMB Bank Berhad v. Hosba Valley Resort Sdn Bhd [2012] 1 LNS 627 HC* ***(refd)***

Island Hill Sdn Bhd v. Pengurusan Danaharta Nasional Bhd [2012] 5 MLJ 506 ***(foll)***

Juara Aspirasi (M) Sdn Bhd v. Tan Soon Ping [2012] 1 MLJ 50 ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(foll)***

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Legislation referred to:

Companies Act 1965, s. 218(2)(a)
Limitation Act 1953, ss. 2, 6(3)
Rules of Court 2012, O. 14A, O. 46 r. 2
Rules of the High Court 1980, O. 46 r. 2

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For the plaintiff - Amarjeet; M/s Zubeda & Amarjeet
For the defendant - Andrew Teh (Foong Mun Yee with him); M/s Wong Lu Peen & Tunku Alina

I *Reported by Najib Tamby*

JUDGMENT

Rozana Ali Yusoff JC:

Background Facts

[1] The defendant (AmBank (M) Bhd) granted a loan facility to the plaintiff (Pacific Plumbing Construction (M) Sdn Bhd) by way of a loan agreement dated 29 May 1996 in the sum of RM446,946 with one Low Wai Keong (LWK), the director and shareholder of the plaintiff as guarantor and a mortgage over property held under HS(D) 55098, PT4, Section 91A, Kuala Lumpur (the said property). On 10 March 2006, the defendant filed an action against the plaintiff and LWK. Judgment was obtained against LWK on 2 May 2006 and against the plaintiff on 8 May 2006. Subsequently receiving and adjudication order (RO AO) was obtained against LWK and the said property was auctioned on 23 February 2010. The defendant then issued a notice under s. 218(2)(a) of the Companies Act 1965 (the said notice) for the outstanding sum of RM1,523,486.31 due and owing as at 22 April 2013.

Submission By The Plaintiff

[2] The defendant as the judgment creditor of the judgment dated 8 May 2006 did not take any enforcement claiming the debt or recovering the judgment sum against the plaintiff as the judgment debtor except for issuing the notice of demand dated 25 April 2013 under s. 218(2)(a) of the Companies Act 1965.

[3] On receiving the notice of demand, the plaintiff disputed the same by challenging the demand notice was done after the expiration of the defendant's right of enforcement and that the right of enforcement no longer existed (without leave of the court) at the time the demand notice was issued.

[4] The plaintiff contended *inter alia* that the defendant had waived and/or abandoned its right of enforcement by failing to enforce the said judgment within six years from the date of the said judgment (which expired on 7 May 2012) and/or by failing to obtain leave to execute thereafter and having full knowledge of such matter. Therefore the defendant is barred from or has lost/ abandoned its right to enforce the said judgment by way of the said notice under s. 218(2)(a) of the Companies Act 1965.

[5] The plaintiff also contended that leave under O. 46 of the Rules of Court 2012 is necessary for the issuance of s. 218(2)(a) notice made after six years from the date of judgment. Given that no leave was obtained the defendant's notice is invalid.

[6] The plaintiff submitted that by claiming the debt on the said judgment the defendant had (after the waiver and abandonment of the right of enforcement having materialized) caused the demand to have been made maliciously against the plaintiff. Further the defendant is hereby estopped from demanding the same by the demand notice since it was unjust and/or invalid and/or wrongful and was an abuse of process.

[7] By reasons thereof the plaintiff prayed for the followings:

(i) The declaration that the demand notice is unjust and/or invalid;

(ii) An order that the demand notice be set aside;

(iii) A declaration that the defendant is no longer entitled to enforce or rely on the said judgment for the purpose of enforcing it against the plaintiff;

(iv) An order that there be an injunction restraining the defendant from enforcing or relying or acting upon the said judgment;

(v) A declaration that the defendant has acted wrongfully towards the plaintiff;

(vi) For orders that damages be assessed with interest and costs to be paid by the defendant to the plaintiff.

Submission By The Defendant

[8] The defendant has filed its defence dated 11 June 2013 disputing the plaintiff's claim contending *inter alia* that the issuance of a notice of demand under s. 218(2)(a) of the Companies Act 1965 to initiate the filing of the companies winding up action based on the outstanding debt is not an enforcement of judgment and thus the defendant is entitled to issue the said notice beyond the period of six years from the date of the said judgment.

[9] The defendant submitted that it is no requirement for the defendant to obtain leave of court prior to the issuance of the demand notice under s. 218(2)(a) since the winding up proceedings is not a form of enforcement within the meaning of O. 46 of the Rules of Court 2012.

[10] The defendant has now filed an application for disposal of the case on point of law pursuant to O. 14A of the Rules of the Court 2012 for the determination of the following question of law:

> Whether the Notice of Demand dated 25/04/2013 pursuant to Section 218(2)(a) of the Companies Act, 1965 issued by the Defendant's solicitors and served on the Plaintiff on 26/04/2013 is valid in law.

[11] The defendant submitted that the proposed question ought to be answered in affirmative and the plaintiff's claims ought to be dismissed on a summary basis without the need to have the trial of the action.

Findings Of The Court

[12] The court finds that the main facts and the said judgment obtained against the plaintiff were not disputed. The said judgment also has not been set aside and neither an appeal was made against it. The defendant has issued the said notice under s. 218(2)(a) of the Companies Act 1965 which reads;

> A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

[13] In answering the question of law above, the court has to determine whether the issuance of the said notice is an execution proceeding where the enforcement of which requires leave of the court after the lapse of six years in accordance with O. 46 Rules of the Court 2012. Order 46 reads;

> Definition (O. 46 r. 1)
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> In this Order, unless the context otherwise requires, "writ of execution" includes a writ of seizure and sale, a writ of possession and a writ of delivery.
>
> (When leave to issue any writ of execution is necessary (O. 46 r. 2)

A (1) A writ of execution to enforce a judgment or order may not be issued without the leave of the Court in the following cases:

(a) where six years or more have lapsed since the date of the judgment or order;

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(b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;

(c) where the judgment or order is against the assets of a C deceased person coming to the hand of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;

(d) where under the judgment or order any person is entitled to relief subject to the fulfilment of any condition which D it is alleged has been fulfilled; and

(e) where any movable property sought to be seized under a writ of execution is in the hands of a receiver appointed by the Court.

E (2) Paragraph (1) is without prejudice to any written law or rule by which a person is required to obtain the leave of the Court for the issue of a writ of execution or to proceed to execution on or otherwise the enforcement of a judgment or order.

F (3) Where the court grants leave, whether under this rule or otherwise, for the issue of a writ of execution and the writ is not issued within one year after the date of the order granting such leave, the order shall cease to have effect, without prejudice, however, to the making of a fresh order.

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[14] In *AmBank (M) Bhd v. Tan Tem Son & Another Appeal* [2013] 3 CLJ 317; [2013] 3 MLJ 197 where the Federal Court held that O. 46 r. 2 of the Rules of the High Court 1980 did not apply to bankruptcy proceedings. A bankruptcy proceeding was H not a writ of execution within the meaning of O. 46 r. 2 of the Rules of High Court 1980.

[15] In *CIMB Bank Berhad v. Hosba Valley Resort Sdn Bhd* [2012] 1 LNS 627, the learned judge referred to the case of *Juara* I *Aspirasi (M) Sdn Bhd v. Tan Soon Ping* [2012] 1 MLJ 50 where the learned judges took into consideration the Federal Court

decision in *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; [2004] 3 MLJ 253 at p. 265 Abdul Hamid Mohamad FCJ (as he then was) in delivering the decision of the Federal Court held that a bankruptcy proceeding is not a writ of execution, which was a continuation of the existing proceeding to enforce the judgment provided by the same rules of court, ie, the Rules of the High Court. Bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt, and the object being to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with the loss of control over his properties to the official assignee. The fact it is based on a judgment does not necessarily make it a continuation of the existing proceedings. It is a proceeding by way of petition just like divorce, winding up or election to name a few, bears the characteristics of a fresh proceeding unlike an execution proceeding. **The principle is equally applicable to winding up proceedings**. (emphasis added)

[16] Relying on the cases above, it is clear that winding up proceeding cannot be equated with enforcement of judgment proceedings and was not within the ambit and meaning of 'execution' proceedings as provided by O. 46 r. 2 of the Rules of Court 2012 and thus leave of court is not necessary in this present case.

[17] Since winding up proceedings are not proceedings within the meaning of execution proceedings as provided under O. 46 of the Rules of the Court 2012, as such the issuance of the said notice under s. 218(2)(a) of the Companies Act 1965 (to commence winding up proceedings as per the said notice) issued after the lapse of six years from the date of the said judgment is valid in law.

[18] In *Island Hill Sdn Bhd v. Pengurusan Danaharta Nasional Bhd* [2012] 5 MLJ 506 the Court of Appeal adopting the approach in the case of *Lim Ah Hee* (*supra*) held:

> (2) It was also found that s. 6(3) Limitation Act of the Act applied to winding up proceedings and that these proceedings should be instituted within 12 years of the date of judgment …

[19] In the above case, the court finds that s. 2 read together with s. 6(3) of the Limitation Act 1953 is relevant and applicable. In the present case, the defendant has issued the said notice under s. 218(2)(a) of the Companies Act 1965, six years, 11 months and 17 days from the date of the said judgment and is well within the limitation period of 12 years, as such the said notice is valid in law.

The question of law having been answered in the affirmative, the plaintiff's claim is hereby dismissed with costs of RM5,000 to be paid to the defendant.